BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KIMBERLY M. ISAIAH Claimant	)	
VS.	)	
KANSAS UNIVERSITY PHYSICIANS Respondent	)	Docket No. 1,053,164
AND	)	
TRAVELERS INDEMNITY COMPANY OF AMERICA Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the August 25, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Pamela J. Billings of Kansas City, Missouri, appeared for claimant. Ronald A. Prichard of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 24, 2011, preliminary hearing and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

Claimant testified that during the course of her employment that first her right hand and later her left hand began hurting. Certain work activities would cause her hands to hurt. On August 27, 2010, claimant was discharged for job performance. In September 2010, claimant consulted her personal physician about her hands. An EMG revealed claimant had bilateral carpal tunnel syndrome. Claimant filed a claim for workers compensation on October 7, 2010, and an application for hearing on October 28, 2010, alleging an injury to the hands, arms and elbows. Claimant alleged the date of accident was approximately December 20, 2004, and continuing through approximately August 27,

2010. Claimant filed an application for preliminary hearing, wherein she requested medical treatment.

Respondent asserts claimant failed to meet her burden of proof that the bilateral carpal tunnel syndrome was work related. Respondent points out that claimant made no complaints to anyone of hand problems and never sought medical treatment until after she was terminated. In his Order, the ALJ stated: "The court does not find credible evidence that the claimant's carpal tunnel syndrome arose from or in the course of her varied job duties."[1] He denied claimant's request for medical treatment.

Did claimant's carpal tunnel syndrome arise out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant was employed by respondent from December 2004 until August 27, 2010, as a patient service representative. Claimant's job as a patient service representative required her to check patients in and out, make appointments, collect co-payments, scan insurance cards and identification cards, write, type, use a computer mouse and file documents. Claimant's job duties required her to operate an array of office equipment, including a computer, copier, credit card machine and telephone.

Claimant testified that she would constantly perform different job tasks. She would move from the computer, to the copier, to the fax and to the telephone. When a patient came in, she would sometimes help them complete a sign-in sheet. She would then update the information on the computer. She would make sure respondent had current copies of the claimant's insurance card and photo ID, and make copies if necessary. If the patient was making a co-payment, the claimant would run the patient's payment through the credit card machine. If a patient was on Medicare, claimant would pull an MSPQ card for Medicare from the patient's file, have the patient initial the card and then file the card. Claimant testified she would deal with six to eight patients per hour.

At the end of 2005, claimant began having problems with her right hand. She would have pain in her right hand while typing and would have strains in the right hand while using the mouse or punching buttons. The more she used her right hand, the worse it got. Claimant testified her right hand is worse than the left. It is constantly in pain and she wears a brace on it more than she does the left. Although claimant is left-hand dominant, she bowls right-handed. Due to the problems in the right hand, claimant quit bowling three to four years prior to the preliminary hearing.

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[1] ALJ Order (Aug. 25, 2011) at 2.

Claimant began noticing problems with her left hand in 2006. It tingles and stays numb. Occasionally claimant feels pain in the left hand when she bends it or moves items. She noticed this when she punched buttons on the fax machine, filed and wrote. Claimant testified that her left hand became worse during the course of her employment.

While working for respondent, claimant never told her supervisors about the problems with her hands. She indicated she may have mentioned to a couple of co-workers that she had hand problems. While working, she never saw a physician for her hand problems.

Claimant testified she was terminated by respondent on August 27, 2010. The only explanation she was given was job performance. At the preliminary hearing claimant testified that she applied for, and was receiving, unemployment benefits.

Claimant went to see Dr. Steven Braton, her family physician, on September 15, 2010. Claimant testified that at the time, she had health insurance. She waited to see him until after she was discharged in order not to take time off work. Dr. Braton's notes from September 15, 2010, state claimant was fired from her job. His report indicated that claimant noticed a knot on her right hand one and one-half years earlier. She also had pain at the level of the right wrist and was dropping items. On September 29, 2010, claimant again saw Dr. Braton. His records contain no complaints by claimant of left-hand problems.

Dr. Braton referred claimant to see Dr. Steven C. Kosa, a neurologist. Claimant saw Dr. Kosa on September 30, 2010. He conducted EMG tests, which showed claimant had bilateral median mononeuropathies consistent with the clinical diagnosis of carpal tunnel syndrome, electrographically worse on the left. His notes indicate that this did not correlate with claimant's symptoms which were much worse on the right, but that was not unusual. Dr. Kosa's report gives no opinion as to causation.

At the request of her attorney, claimant saw Dr. Lynn D. Ketchum, a hand specialist, on April 20, 2011. He reviewed the records of Drs. Braton and Kosa and took a medical history from claimant. Claimant described her work activities in some detail to Dr. Ketchum. Dr. Ketchum reviewed x-rays, which revealed a sizable metacarpal boss in the right second digit CMC joint. On x-ray she had a static diastasis of 5 mm between the scaphoid and the lunate, origin undetermined. Claimant had a negative Phalen's test on the right, but positive on the left. She had a positive Tinel's sign at both elbows, but negative at both wrists.

In his report, Dr. Ketchum stated:

> Her diagnoses at this time are bilateral carpal tunnel syndrome, mild to moderate, with almost constant numbness on the left and she does have some weakness in the right thenar eminence. She has a negative Phalen's test on the right but

> positive on the left at 20 seconds, a negative Tinel's sign at both wrists but positive at both elbows. She has right scapholunate diastasis. It is more likely than not that those three diagnoses were caused or certainly aggravated by her work at KU Physicians, Inc., as well as her stenosing tenosynovitis of the left third digit A1 pulley. The metacarpal boss, in all likelihood, was present before she started work at KU Physicians, Inc., but became significantly more symptomatic while there. It is my feeling that more likely than not, it was aggravated by her work there.[2]

The ALJ indicated that claimant's date of accident was the date she reported the injury, which was October 7, 2010.[3] That was the date claimant made a written claim for compensation. Accordingly, the ALJ found claimant gave timely notice. The ALJ concluded that claimant failed to prove that her bilateral carpal tunnel syndrome arose out of and in the course of her employment. He stated:

> The remaining question is whether the claimant was injured in the course and scope of employment. It is hard to see the repetitive job tasks that allegedly caused or aggravated carpal tunnel syndrome. The claimant did not do any one thing repetitively. She did a variety of tasks in the course of the approximately ten minute period she dealt with each patient. If these tasks were truly causing physical complaints eight hours a day, five days a week, over a three year period, one would think the claimant would have mentioned it to her employer. One would think she would have mentioned it to her doctor. The fact the claimant did not mention these alleged on-the-job symptoms the entire time she worked there casts doubt on her claim that these symptoms were occurring from her job duties. And the claimant's assertion that her symptoms increased significantly from her job duties was the sole apparent basis for Dr. Ketchum opining a work related injury.[4]

PRINCIPLES OF LAW

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[5] A claimant must establish that his or her personal injury was caused by an "accident arising

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[2] P.H. Trans., Cl. Ex. 4.

[3] *Id.*, at 32; ALJ Order (Aug. 25, 2011) at 2.

[4] ALJ Order (Aug. 25, 2011) at 2.

[5] K.S.A. 2010 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

out of and in the course of employment."[6] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[7]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[8] Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.[9]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[10] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[11]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[12]

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[6] K.S.A. 2010 Supp. 44-501(a).

[7] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[8] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[9] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[10] K.S.A. 2010 Supp. 44-501(a).

[11] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[12] *Id.*, at 278.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[14]

ANALYSIS AND CONCLUSION

Claimant has the burden of proving that her bilateral carpal tunnel syndrome was work related. Dr. Ketchum's opinion that claimant's hand and wrist problems were caused or aggravated by her work activities is based upon the history given to him by claimant. Part of that history was a detailed description of claimant's work activities.

The ALJ found it significant that claimant never mentioned her hand problems to a supervisor and did not seek medical treatment until September 15, 2010. This was after claimant was terminated by respondent. Claimant asserts she gave timely notice of her accident/injury to respondent and had no duty to report the injury while working. Respondent contends the ALJ was not imposing upon claimant an obligation to report the injury while working, but was merely addressing claimant's credibility.

This is a close case. Claimant's counsel is correct when she asserts that medical evidence is not essential to prove that claimant's injury arose out of and in the course of her employment. In many claims, the testimony of the claimant is paramount in resolving whether the injury arose out of and in the course of employment.

Claimant alleges her right hand began bothering her in late 2005 and her left hand in 2006. Yet the first time she saw a physician for her hands was in September 2010, nearly five years after she started having problems. Her right hand condition was severe enough that she quit bowling three to four years prior to the preliminary hearing. She testified about having constant pain in the right hand. It is difficult to fathom why claimant did not seek medical treatment earlier. However, that does not prove claimant's hand and wrist problems were not work related. Nor does it mean she was not credible.

The ALJ stated claimant did not do one job task repetitively, but performed a variety of tasks in a 10-minute period. This ignores the fact that claimant would repeat the same tasks every time she worked with a patient. Claimant saw six to eight patients an hour, during each eight-hour workday. The diagnostic tests performed on claimant verified that she had several medical problems with her hands and wrists. Dr. Ketchum opined the medical conditions he diagnosed in claimant's hands and wrists were caused or

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[13] K.S.A. 44-534a.

[14] K.S.A. 2010 Supp. 44-555c(k).

aggravated by her work activities while employed by respondent. Additionally, respondent offered no alternate explanation as to what caused or aggravated claimant's hand and wrist condition. Thus, this Board Member concludes medical evidence and claimant's testimony support a finding that claimant met with personal injury by accident arising out of and in the course of her employment with respondent.

WHEREFORE, the undersigned Board Member reverses the August 25, 2011, preliminary hearing Order entered by ALJ Hursh and remands for further orders on claimant's request for preliminary benefits.

IT IS SO ORDERED.

Dated this ____ day of November, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Pamela J. Billings, Attorney for Claimant
Ronald A. Prichard, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge